

**Exhibit G**

can be successfully attacked, the entire United States title system is in jeopardy. Title insurance companies, who relied on the fee patent, would face financial ruin. "The return of the land to trust status would potentially result in a checkerboard effect on civil and criminal jurisdiction, and would certainly remove the land from the tax base of the county and local school district." LaFave at 96. If the land were returned to the plaintiffs, the government would "hold in trust for the benefit of the allottee's heirs, fractionalized shares in the original 160-acre allotment." *Id.* This would be a hollow victory for the plaintiffs.

Meanwhile, nonfederal defendants, innocent of any possible wrongdoing, face ejectment and thousands of dollars in attorney's fees. Although this case does not fit the criteria so as to be classified as a political question, the forced fee patent claims cry out for a legislative solution, and not a judicial solution.

---

*Counsel for plaintiffs:* Ramon A. Roubideaux, Rapid City, South Dakota; Mario Gonzalez, Pine Ridge, South Dakota; John T. Hughes, Sturgis, South Dakota; Kim Jerome Gottschalk, Jeanette Wolfley, Native American Rights Fund, Boulder, Colorado

*Counsel for defendants:* Tom D. Tobin, John Simpson, Winner, South Dakota; David Mustone, Washington, D.C.; Phillip Hogan, U.S. Attorney, Sioux Falls, South Dakota; Kenneth A. Pels, U.S. Justice Dept., Washington, D.C.; John P. Guhin, Ass't State Attorney General, Pierre, South Dakota; Robert A. Sambrook, Jr., Kadoka, South Dakota

---

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

NORTHERN CHEYENNE TRIBE v. HODEL, et al.

No. CV 82-116-BLG (D. Mont., May 28, 1985)

### Summary

Concluding that the federal government's trust responsibilities to the Northern Cheyenne Tribe required the Interior Secretary to carefully consider the impact of leasing coal lying adjacent to or near the reservation, and finding that the prepared environmental impact studies failed to adequately analyze not only the physical, but also the social, economic and cultural effects of the coal development on the tribe, the Montana District Court voids the federally issued coal leases as violative of statutory law.

### Full Text

Before BATTIN, Chief Judge

### Memorandum Opinion

Plaintiff, the Northern Cheyenne Tribe, seeks judicial review of the Secretary of the Interior's final decision to sell coal leases on lands located in the southeastern Montana portion of the Powder River coal region. The tribe requests declaratory and injunctive relief holding that the sale was held in violation of federal law and requiring that the Secretary void the sale, refrain from issuing leases, and rescind any leases that have been issued. The case is presently before the court on motions by both the tribe and the federal defendants for summary judgment. For reasons outlined below, the tribe's motion is granted, and the federal defendants' motion is denied.

### Factual and Procedural Background

In the late 1970s, as part of its comprehensive federal coal management program, the Department of the Interior proposed to make available for leasing portions of the extensive federal coal holdings. These efforts marked the end of a decade where federal coal leasing had been halted for various reasons by both congressional and judicial action. The Powder River coal region of southeastern Montana and northern Wyoming, one of 12 coal leasing regions nationwide, is one situs of the Department's renewed leasing activity. On April 28, 1982, the first of a planned series of lease sales in this region was held. This sale was the largest sale of federal coal leases held up to that time. The Secretary's decision to hold this sale is the focus of the Northern Cheyenne Tribe's challenge.

The Northern Cheyenne Indian Reservation lies amidst the Powder River coal region. In the April 1982 sale the Department offered to lease eight tracts in Montana containing approximately 465 million tons of federal coal. Other tracts situated in Wyoming were also offered. The eight Montana tracts, which include both "production maintenance" and new mine tracts, surround the reservation on its north, east, and south sides, and the tracts lie in close proximity to the reservation's borders: the farthest is only about 16 miles from the reservation's southern border. The Department plans subsequent sales to lease additional tracts, and several of the areas being considered for future sale are also adjacent to or near the reservation.

The leasing of federal coal is governed in part by the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 201 *et seq.*, which amended the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq.*, and the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* The Secretary has formulated leasing regulations pursuant to the FCLAA. See 43 C.F.R. § 3400 *et seq.* The FCLAA contemplates that federal coal be developed in four somewhat discrete steps: land use planning, activity planning, coal lease sales, and eventually, mining.

The Northern Cheyenne Tribe focuses its concerns on the activity planning stage of coal development. In activity planning specific tracts of coal are identified from land use planning documents and are studied for possible sale. The goal of activity planning is to provide recommendations to the Secretary pertaining to specific tracts to lease, the amount of coal to sell, and how the sale should be timed. Development of leasing targets and a regional production goal and preparation of an EIS to identify the environmental impacts of a proposed sale are integral parts of the activity planning process.

Activity planning is guided by a regional coal team (RCT). The Powder River RCT is composed of the governors and the state BLM directors of Wyoming and Montana. Other federal, state and local officials are ex officio, or nonvoting, members of the RCT. Representatives from both the Northern Cheyenne and Crow Indian Tribes were invited to participate as ex officio members of the RCT.

Activity planning commenced with the call for expressions of leasing interest in the Powder River basin. See 45 Fed. Reg. 21718 (Apr. 2, 1980). The RCT selected lease tracts for inclusion as alternatives in the EIS and ranked those tracts high, medium, or low, in the categories of coal economics, impacts on the natural environment, and socioeconomic impacts. Specific tract-ranking factors were submitted by the BLM to the RCT for consideration, and after publication and public comment the factors were adopted at a January 1981 RCT meeting. Tract selection and ranking were completed at an RCT meeting held on May 21, 1981.

Leasing targets and regional production goals were also developed during the activity planning stage. Leasing targets

are established "for the purposes of setting Departmental priorities, aiding the states in planning for potential future impacts of coal development, and supplying the guidance for establishing the amount of coal to be offered through proposed lease sale schedules." 43 C.F.R. § 3420.3-1(b) (1981). On June 7, 1979, the Secretary set a tentative leasing target of 776 million tons to achieve 1985 to 1987 production levels for the Powder River region. In January 1981 the Department established a new leasing target pursuant to 43 C.F.R. § 3420.3-2(a)-(j) directed at production levels through 1990. Upon the recommendation of the RCT a leasing target of 1.5 billion tons was selected, and this new target was the basis of the preferred alternative in the Powder River EIS.

The coal management regulations require that a regional EIS on the alternate lease sale schedules be prepared in accordance with the provisions of the National Environmental Policy Act, 42 U.S.C. § 4321. The EIS is to be prepared as part of the activity-planning process and is to include both site-specific and cumulative intraregional analyses. See 43 C.F.R. § 3420.4-5. To that end, the Department commenced planning of the Powder River region EIS in July 1979. Site-specific analyses of the environmental impacts of each tract being considered for lease sale were completed in December 1980 and were used by the RCT during tract ranking at the January 1981 RCT meeting. These tract profiles were adjusted to correct for action taken by the RCT subsequent to completion of the profiles. The tract profiles were then incorporated by reference into the EIS. The cumulative analysis began with EIS scoping and significant issue analysis which occurred in late 1980 and early 1981. These analyses were incorporated into a preliminary preparation plan, a preliminary cumulative analysis, and later a preliminary report on alternatives and impacts.

A draft EIS was issued on June 24, 1981. After public hearings and the close of the comment period on the draft EIS on September 17, 1981, the draft EIS and the comments were submitted to the RCT for final consideration. Subsequently, on December 1, 1981, the final EIS was published.

The final meeting of the RCT on December 1, 1981, resulted in a recommendation to the Secretary that 13 coal tracts in both Montana and Wyoming be offered in the first sale. On February 22, 1982, the Secretary decided to offer 15 tracts containing an estimated 2.24 billion tons of recoverable reserves for competitive lease sale and four additional Montana tracts to be sold by intertract sale procedures. The Secretary adopted a sale schedule with the first sale to be held on April 28, 1982, in Cheyenne, Wyoming. Subsequently, six tracts were withdrawn from the original sale notice due to absence of surface owner consents or discrepancies in estimated tonnage.

In March and April of 1982 the tribe initiated an intensive effort to convince the Department to address the tribe's concerns about the sale. Discussions were held with numerous Department officials. Tribal representatives and attorneys in discussions, telephone calls, and written submissions, stated their concerns that the Department had inexcusably failed to address impacts on the tribe in the process leading up to the decision to hold lease sales. The Secretary denied further consideration of the tribe's claims.

On April 21, 1982, the tribe filed this suit, together with a motion for a temporary restraining order, in the United States District Court for the District of Columbia. Although the context is more complicated, the tribe basically complains that although this lease sale will result in a dramatic escalation of coal development close to the reservation, the Department and the EIS planners failed to consider either the effects—primarily social, economic, and cultural effects—of this development on the tribe or measures to mitigate those

effects. The tribe asserts that this is a fatal defect in the decisional process and the EIS.

After a hearing on April 22, 1982, the tribe's motion for a temporary restraining order was denied, and the lease sale proceeded as scheduled. Bids were received on 11 tracts in Montana and Wyoming containing approximately 1.53 billion tons of coal. Bidders were notified prior to the sale of a *lis pendens* on the sale brought about by this litigation. All of the leases have been granted to successful bidders. The leases have been conditioned upon the outcome of this case.

On June 1, 1982, the District of Columbia court consolidated this case with *National Wildlife Federation, et al. v. Burford*, CV-82-117-BLG. Both cases were transferred to this court by order dated June 7, 1982. Although both cases arise out of the Powder River coal sale, they present the court, except in one instance, with entirely different issues. Only one issue concerning the validity of the Department of the Interior's manner of treating surface owner consent under the Surface Mining Control and Reclamation Act (SMCRA) is commonly raised by both the Northern Cheyenne Tribe and the National Wildlife Federation (NWF) plaintiffs. The court has found it unnecessary to reach this common issue with respect to the tribe's claims and has determined that it is more convenient to separate these cases for decision.

#### Jurisdiction and Scope of Review

Jurisdiction in this court is founded on 28 U.S.C. §§ 1331, 1332, 1361 and, more particularly, 1362. Section 1362 provides for district court jurisdiction in civil actions brought by an Indian tribe recognized by the Secretary of the Interior "wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Plaintiffs seek review of an agency action pursuant to the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. Section 702 of the APA waives sovereign immunity to suit and provides for judicial review where a person, in this case the tribe, is "adversely affected or aggrieved by agency action within the meaning of a relevant statute" and seeks relief other than money damages. The court may hold unlawful and set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or accomplished "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (B).

The APA's "arbitrary and capricious" standards limit this court's scope of review. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Supreme Court stated that before a court may overturn an agency decision under this standard,

[t]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the fact is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

*Id.* at 416 (citations omitted). Agency decisions may be reversed only if no reasonable basis for the decision has been given by the agency. See *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). Generally, the court must confine its review to the full administrative record which was before the agency and on which the agency determination was based. See *Camp v. Pitts*, 411 U.S. 138, 142 (1973); but see *Public Power Council v. Johnson*, 674 F.2d 791 (9th Cir. 1982) (outlines the narrow exceptions to the general rule). The court must accord great deference to the agency's interpretation of the regulations it is charged with administering. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

The court's role in reviewing the Department's actions under NEPA has a two-fold purpose. First, and most important to the instant case, the court must ascertain whether the Department took a "hard look" at the environmental consequences of its actions by observing the procedure required by law to disclose and consider every significant aspect of the environmental impact of the proposed action. See *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). "Under this standard of review, we employ a 'rule of reason' that inquires whether an EIS contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (quoting *Trout Unlimited, Inc. v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)). Second, the court must ensure that the Department has met its substantive obligations by applying the "arbitrary and capricious" standard to the Department's conclusions. See *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97-98 (1983); *Isaac Walton League v. Marsh*, 655 F.2d 346, 371 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981).

#### Discussion

##### A. Duty to Consider Impacts on the Tribe Under NEPA

The decision to hold the Powder River coal sale was subject to the requirements embodied in NEPA. The sale was a major federal action significantly affecting the quality of the human environment and therefore required an environmental impact statement to be prepared to aid the decision. See 42 U.S.C. § 4332(2)(C); see, e.g., *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 851 (9th Cir. 1979) (per curiam). The Department itself has recognized in its publications and regulations that an EIS must be prepared when formulating regional coal sales under the federal coal management program. See Final Environmental Statement, Federal Coal Management Program (Program EIS) at 3-9, 3-63, 3-68, 5-123, 5-124; 43 C.F.R. §§ 3400.4(c), 3420.4-4, -5.

The environmental impact statement must, among other things, detail "the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] alternatives to the proposed action...." 42 U.S.C. § 4332(2)(C). Agencies are obliged under NEPA to identify and investigate the impacts upon the existing environment that are likely to occur by reason of the alternatives under consideration. The environmental consequences of the proposed action must then be integrated into agency decision-making. See *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979). For an EIS to serve its intended purpose "as an action-forcing device to ensure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the federal government...." 40 C.F.R. § 1502.1 (1981), the agency should use the EIS as a tool in decision-making and not merely as a disclosure document after the decision to proceed with a proposed action has already been made. *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774 (9th Cir. 1980). Finally, and logically, the agency must take advantage of the opportunities provided in the NEPA process to investigate and consider measures to mitigate or find alternatives to adverse environmental impacts to the fullest extent possible. *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109, 1128 (D.C. Cir. 1971).

Included among those effects that must be assessed in an EIS are the social and economic impacts of the proposed action. Section 102a of NEPA, 42 U.S.C. § 4332(2)(A) requires that federal agencies, to the fullest extent possible, "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision-

making which may have an impact on man's environment." The Council on Environmental Quality (CEQ) regulations, which have been adopted by the Department of the Interior, see 45 Fed. Reg. 27541, 27544 (Mar. 18, 1980), define effects or impacts broadly to include "ecological..., aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1503.8(b).

The Department faults the tribe's emphasis on social and economic impacts in its attack on the EIS. The Department argues that the tribe basically misunderstands NEPA and that it is trying to shift NEPA's focus from the natural, physical environment to sociology and economics. Citing *Goodman Group, Inc. v. Dishroom*, 679 F.2d 182, 185 (9th Cir. 1982), the Department implies that it has more discretion to reject social, economic, and cultural issues from consideration in an EIS. In this instance, however, this assertion is incorrect.

In its definition of the human environment, the CEQ recognizes that economic and social effects do not, by themselves, necessitate the preparation of an EIS. Thus, a federal renewal project such as was the case in *Goodman*, or the construction of a detention center, low income housing project, post office, or other public facility in a neighborhood, even if the facility has potential to increase crime and traffic, reduce property values, or otherwise change the character of the neighborhood, does not fall within the ambit of NEPA. See, e.g., *Como-Falcon Community Coalition, Inc. v. U.S. Dept. of Labor*, 446 U.S. 936 (1980); *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225, 231 (7th Cir. 1975), cert. denied, 609 F.2d 342, 346-46 (8th Cir. 1979), cert. denied, 424 U.S. 967 (1976). These federal actions simply have no nexus to a physical effect on the natural environment. But if an impact statement is otherwise required because the proposed action impacts the natural or physical environment, then the agency must consider all impacts of the action, including the interrelated economic or social impacts. See 40 C.F.R. § 1503.14.

In a recent case, the Supreme Court examined the relationship between a particular effect and the environmental effect caused by the proposed action that must be present before an agency is required under NEPA to consider the effect. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), concerned the restarting of the nuclear reactor at Three Mile Island that had been damaged in a serious accident. A group of local residents contended that restarting the reactor would adversely affect the psychological health of citizens in the area and would seriously damage the well-being of neighboring communities. The Court concluded that the agency was not required under NEPA to consider the group's contentions. The Court found that:

[T]he terms "environmental effect" and "environmental impact" in § 102 [of NEPA] should be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate cause from tort law.

*Id.* at 774. The Court further found that "a risk of an accident is not an effect on the physical environment." *Id.* at 775. Because this risk and its perception were necessary middle links in the causal chain, "the element of risk lengthens the causal chain beyond the reach of NEPA." *Id.*

Applying the *Metropolitan Edison* analysis to the instant case, it is clear that the physical disturbance, here the mining of the coal sold at the lease sale, is the proximate cause of the expected socioeconomic impacts in the affected area. A substantial increase in regional coal mining will cause not only those socioeconomic impacts which may directly arise from the physical disturbance, for example, displacement of area residents from homes or disruption of ranching or farming by

the actual encroachment of a strip mine onto land previously used for those purposes, but also those indirect socioeconomic impacts including the social disruption caused by increased numbers of miners, their families, and others who will provide services, the increased demand for schools, housing, water and sewer services, and the increased strain on local governments. This indirect and direct social and economic disruption is not a risk; it flows inevitably from mining of federal coal in the region. The Department was required to consider the socioeconomic impacts of federal coal development on the surrounding area.

The Department itself recognized the necessity to investigate in detail the social and economic effects of federal coal development in the region.

The issue of primary concern is the impact of coal mine development and *population increases to communities*. Many other resource impacts are presented and analyzed here; water resources, reclamation, air quality, *sociology, economics, and railroad transportation are of primary significance*.

*Powder River Final Environmental Impact Statement* at 1 (emphasis added). The scope of the socioeconomic data sought by the Department to rank tracts for leasing is set out in Table 1-2 of the EIS and includes both direct and indirect socioeconomic factors. *Id.* at 11. A review of the EIS indicates, however, that the Department's ostensible concern with socioeconomic impact did not evolve into any meaningful analysis of the extent of such impacts on certain groups of residents within the affected area, particularly the Northern Cheyenne Tribe.

It appears obvious that the Department was required to consider the impacts, including social and economic impacts, of federal coal development on the Northern Cheyenne community. Merely consulting a map and noting the close proximity of the lease tracts to the reservation logically leads to this conclusion. Further, the population of the Indian community on the reservation is sizeable in comparison with surrounding communities that did receive the attention of the EIS preparers.

Despite the need to consider coal development impacts on the Northern Cheyenne Tribe, a perusal of the Powder River coal region EIS unearths relatively few references to the tribe or tribal land. There are a few passing references to the reservation's Class I air quality status, *Powder River Final Environmental Impact Statement* at 2, 38, and to the potential for increased traffic on reservations [*sic*] roads and the necessity of upgrading these roads. *Id.* at 3, 41, 64. There are a few other references to the reservation's coal reserves, *id.* at 7, and to certain leases authorized by the Northern Cheyenne exchange legislation, P.L. 96-401. *Id.* at 1, 7, 30. The closest the Department comes in the EIS to recognizing any socioeconomic impact on the reservation is in an isolated statement lacking analysis on page 65 of the EIS: "In Ashland there is a potential for conflicts between the newcomers and the native Americans. It is likely the native Americans would feel their lifestyle and community (both in Ashland and on the Reservation) has been threatened by newcomers." It is evident that the concerns of the Northern Cheyenne Indian Tribe as an entity have been largely ignored in the EIS.

The Department attempts to explain how impacts of federal coal development on the Tribe and its reservation are addressed in the EIS by assuming the following position:

When all is said and done, plaintiff's complaint is that the Environmental Impact Statement does not deal with the effects of the Powder River Sale on Indians. Rather, it deals with Indians simply as people affected by the sale and their reservation as any other real estate in the sale area. This was a conscious decision of the

Department of the Interior. Prior to the preparation of the EIS the Interior team considered whether Indians would be affected as Indians rather than as individuals in the sale area and it was determined that they would not. The environmental analysis was, therefore, continued without regard to the tribe as a tribe but as potentially affected citizens in the sale area.

Federal defendants' opposition to plaintiffs' motion for a temporary restraining order at 11. Not only does this position virtually concede that the Northern Cheyenne Tribe was not treated as an entity, but it is both refuted factually by the record and legally unsound.

Neither the EIS nor the administrative record reflects that members of Indian communities situated near the lease tracts were in fact treated "as potentially affected citizens in the sale area." The EIS devotes much of its sparse socioeconomic analysis to discussion of potential impact to the off-reservation communities of Ashland, Broadus, and Hardin. For those communities analyses of the socioeconomic impacts of the proposed coal development, including population increases, schools, medical facilities, law enforcement, dwelling units, and employment were prepared. Despite the comparable population of Lame Deer, and the fact that it and other communities within the reservation lie closer to the lease tracts than some of the off-reservation communities that were studied, there is no evidence that socioeconomic or cultural impacts on the Northern Cheyenne Tribe were considered. The EIS, for example, does not acknowledge the existence of the tribal government and its powers and responsibilities, does not recognize that the reservation is culturally distinct within the region, and does not consider that the different structure of public finance on the reservation may vary the tribe's ability to mitigate the impacts of increased coal development as compared to surrounding communities. Throughout the EIS it appears that discussion of the social, economic, and cultural impacts of federal coal development on the Northern Cheyenne Tribe, either as a tribal entity or simply as people affected by the sale, has been systematically excluded.

Even if socioeconomic impacts on the Northern Cheyenne Tribe were somehow combined with the data from off-reservation communities and reported in the EIS on a county-wide basis, the assumption that the Northern Cheyenne Tribe can be treated merely as potentially affected citizens within the sale area is faulty. As stated earlier, the Northern Cheyenne Tribe is culturally discrete and its governmental structure, income, and services differ substantially from its off-reserva-

---

'Although the court's decision focuses on the exclusion of essential information from the EIS rather than relying upon the quality of the analysis which was attempted, the court notes that the cultural, social, and economic impact analysis in the Powder River EIS is strikingly deficient when compared to EISs for similar federal actions. For example, the Green River-Hams Fork Regional Coal EIS, submitted by the Department as part of the administrative record in this case, contains a significantly greater depth of analysis of these matters. The BLM's Uintah Basis [*sic*] Synfuels Development EIS, issued in 1983 and submitted as an exhibit by the tribe, demonstrates a separate and much more careful analysis and consideration of the social, economic, and cultural impacts upon a reservation of nearby energy development.

The tribe blames the apparent deficiencies in the EIS's social and economic analysis on a rushed timetable and a inflexible demand for completion of the EIS. There is evidence in the record bearing out the tribe's contention. *See, e.g., Admin. Record* at 105, 199, 245, 260, 261, 278.

tion counterparts. In the extensive federal coal management program EIS the Department acknowledged that federal coal development would uniquely impact Indian tribes, and it recognized a specific need to analyze in the regional EISs the impact of coal development to Indian communities.<sup>2</sup> Similar conclusions were drawn in an Energy Impact Steering Group Report which was cited with approval in the program EIS.<sup>3</sup> Both the programmatic EIS and the steering group report evi-

<sup>2</sup>Among the several references in the program EIS which recognize that federal coal development will uniquely affect Indian tribes are the following:

The regional assessments will include...[s]ite specific urban impact analysis and assessment of effects on rural and community development. A special situation may exist in some western localities where population increases occur adjacent to Indian communities in which English is not spoken and traditional lifestyles of the inhabitants predominate.

....

The Department recognizes that the real impacts of Federal Coal Management decisions are felt directly by individuals and families. It also recognizes that some impacts are easier to measure than others. The change from a stable rural environment to a more diverse and unpredictable setting, which combines both rural and urban activity, creates losses for some individuals which are real but difficult to quantify. Such changes may also intensify social tensions, such as those between Indians and non-Indians where coal development occurs near Indian reservations and between the resident ranchers and farmers and the new families attracted by the coal development employment opportunities. These losses and tensions are also the least likely to be avoided or minimized through mitigation efforts.

....

It should be noted in those areas with high rates of unemployment, such as Indian reservations, energy development will have both positive and negative effects. As noted above, the probability of social and cultural conflicts is high. Further, seemingly impossible demands upon existing infrastructures will strain the ability of local communities to deliver essential services. The positive effects will include substantial increases in the demand for labor, and, over time, generation of significant levels of public revenues derived from energy resources.

Final Environmental Statement, Federal Coal Management Program, at 5-124, 125.

<sup>3</sup>The Energy Impact Steering group made the following findings:

If the new population is located in a political and taxing jurisdiction different from the one which realized the increase in tax base, serious financial obstacles to accommodating growth may result from such a jurisdictional mismatch. In some cases, even the added employment is not welcomed by local residents. If the energy development activities merely bring in outsiders (particularly temporary construction workers) who take the jobs and disrupt traditional social and economic patterns, significant community resistance may occur. These social disruption impacts are particularly acute on Indian reservations and in rural communities which have maintained traditional social and political structures and have had little experience with assimilating newcomers.

Report to the President, Energy Impact Assistance, at 8.

Indian reservations experiencing energy development face unique social and cultural stresses. The life-style of Tribal members who take jobs related to energy development may undergo radical change. To the extent that development-related jobs result in an increased regular income, the impacts on life-style may be positive, with benefits possibly accruing to the entire extended family. However, some Indians who fill new jobs may be leaving traditional means of support to do so. Such Indians will face pressure to conform to non-Indian patterns of behavior and to fulfill unfamiliar expectations.

dence that the Department was fully aware that federal coal development may uniquely impact an Indian tribe because the tribal communities are not similarly situated to non-Indian communities off the reservation. Further, the Department was cognizant of a need to carefully identify and address these impacts and develop measures to minimize or mitigate the adverse effects. These concerns did not, however, carry through to the Powder River regional EIS.

Finally, both the EIS and the underlying record are devoid of any explanation or justification for the Department's "conscious decision" to treat tribal members as merely residents of the area for purposes of the EIS. Thus, considering that the record before this court is complete, the court can come to no other conclusion than that the Department's "conscious decision" was arbitrary. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). More likely, the decision was merely an afterthought to rationalize deficiencies in the EIS. Post hoc rationalization is not part of the administrative record and cannot repair a deficient EIS. See *National Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

Therefore, the court concludes that for the Department to take a "hard look" at the environmental consequences of its actions, it was required to disclose and consider the social, economic, and cultural impacts of the proposed coal development on the Northern Cheyenne Indian Tribe as an entity. Neither the EIS, other decisional documents, nor the administrative record reflect that the Department undertook this analysis. Thus the EIS did not "insure a fully informed and well considered decision" to develop federal coal in the Montana portion of the Powder River region. *Vermont Yankee*, 435 U.S. at 558.

#### B. Duties Under the Federal Coal Leasing Act Amendments

Independent of the duty created by NEPA, the Secretary was also required to consider the socioeconomic impacts of coal development on the Northern Cheyenne Tribe under the Federal Coal Leasing Act Amendments (FCLAA) of 1976. 30 U.S.C. § 201(a)(3)(C) provides that:

Prior to the issuance of any coal lease, the Secretary shall consider effects which mining of the proposed lease might have on an impacted community or area, including, but not limited to, impacts on the environment, on agriculture and other economic activities, and on public services....

The resulting pressures on family relationships and living patterns can be considerable.

Although reservations are often areas of high unemployment, much of the local population may not have the skills necessary or the opportunity to fill the jobs created by energy development. Consequently, development is likely to bring with it not only an increase in population but an influx of non-Indian population to and near the reservation. Indian language, cultural values and traditions are likely to be rejected by the new population. New ideas and needs will cause political confrontations on the reservation or with nearby local non-Indian governments. In addition, the stress created as a result of rapid social change increases the potential for inter-cultural conflicts.

*Id.* at 13-14.

Indian tribes facing energy development possibilities will have impact problems comparable to the worst of those facing other largely rural communities, but because of the unique Federal Trust Relationships with Indian tribes, additional and different responses will be necessary.

Though the term "consider" has not been interpreted in the context of this statute, the Ninth Circuit has held under another statutory scheme that to "consider" social, economic, and environmental impacts "means to investigate and analyze, not merely to speculate on the basis of information that is already available, however incomplete." *City of Davis v. Coleman*, 521 F.2d 661, 679 (9th Cir. 1975). As already noted with reference to NEPA obligations, nothing in the environmental impact statement or other documents considered by the Secretary leading to the decision to sell coal leases reflects that the Secretary considered the social and economic impacts on the Northern Cheyenne community.

### C. Defendants' Obligations Under the Special Relationship

Generally, a special relationship exists between the United States and Indian tribes. Out of one aspect of this relationship arises [sic] legally enforceable obligations owing to the tribes by the federal government. These obligations have been likened to the fiduciary obligations that exist between a trustee and a beneficiary. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286 (1942). In the instant case the special relationship between the United States and the Northern Cheyenne Tribe required the Secretary to carefully disclose and consider significant impacts of the proposed coal development on the tribe.

The special relationship has evolved judicially. It originated with the Supreme Court's early decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), where Chief Justice Marshall characterized Indian tribes as "domestic dependent nations" and concluded that "their relation to the United States resembles that of a ward to his guardian." *Id.* at 17. Since that time the relationship has been a cornerstone in the development of Indian law. See generally, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 220.

Unless Congress has acted otherwise, the special relationship imposes strict fiduciary standards of conduct on federal executive agencies in their dealings with Indian tribes. See *United States v. Creek Nation*, 295 U.S. 103 (1935). The Supreme Court, while addressing an alleged mispayment of funds intended for tribal members, stated:

In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards.

*Seminole Nation v. United States*, 316 U.S. at 296-97. Principles of the trust responsibility have been applied by courts in many situations to establish and protect the rights of Indian tribes. See Cohen at 220.

That a special relationship exists between the United States and the Northern Cheyenne Indian Tribe has been recognized by all three branches of government. The United States entered into treaties and agreements with the Northern Cheyenne in 1825 (7 Stat. 255, 11 C. Kappler, *Indian Affairs—Laws and Treaties*, 232 (1904)), 1868 (15 Stat. 655, 11 C. Kappler at 1012), and 1877 (19 Stat. 254, 1 C. Kappler at 168). These treaties express the intention of the United States to protect the Northern Cheyenne and their property. In 1934, Congress enacted the Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.*, as part of a sweeping change in federal policy to revitalize tribal governments and to prevent further erosion of the tribal land base which had been caused by unsuccessful allotment and assimilation policies of previous

decades. The Northern Cheyenne Tribe availed itself of the provisions of the IRA, and the Secretary of the Interior in his capacity as trustee approved the constitution and bylaws that were adopted by the reorganized tribe. See 25 U.S.C. § 476. In other instances the Secretary of the Interior has recognized his trust obligation to the Northern Cheyenne Tribe. In a decision issued on June 4, 1974, regarding reservation coal leases and permits, Secretary Morton held:

As Trustee I take cognizance of my responsibility to preserve the environment and culture of the Northern Cheyenne Tribe and will not subordinate these interests to anyone's desires to develop the natural resources on that reservation.

In 1980, Congress, at the behest of the tribe, passed the Act of October 9, 1980, which rescinded coal leases and prospecting permits on the Northern Cheyenne Reservation. In so doing, Congress found that:

although such leases and permits were approved by representatives of the Secretary of Interior, there are serious questions whether such approval is lawful and consistent with the trust responsibility of the Secretary of the Interior "to act in the best interests" of Indian tribe and individuals....

P.L. 96-401, 94 Stat. 1701 § 1(3) (1980). Finally, the special relationship between the government and the Northern Cheyenne has been recognized judicially. In *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976), the Court recognized "Congress' unique obligation toward the Indians." *Id.* at 656. The Ninth Circuit has noted "that the government also has a fiduciary relationship with the Northern Cheyenne Tribe." *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 [8 Indian L. Rep. 2095] (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981).

Thus, it is clear that a special relationship has existed between the United States and the Northern Cheyenne Tribe for more than 150 years. The court must determine whether this relationship, as it has been defined above, obligated the Department of the Interior to consider the impacts upon the tribe of the lease sale of large deposits of federal coal situated adjacent to the reservation.

The trust responsibility applies not only to on-reservation dealings with tribal property and funds but also extends to other federal action outside the reservation which impacts a tribe. In *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973), a tribe brought an action challenging a regulation promulgated by the Secretary of the Interior governing the allocation of water to an irrigation district in Nevada. The regulation established the amount of water to be diverted to the irrigation district from a diversion point located outside of the tribe's reservation. The consequence of any diversion was to prevent the water from flowing into Pyramid Lake, a desert lake located on the tribe's reservation. This decrease in water endangered the lake environment and threatened the tribe's traditional uses of the lake. In *Pyramid Lake*, therefore, the court was required to directly confront conflicting on-reservation and off-reservation interests in a natural resource. The court found that the Secretary's attempted "accommodation" of the conflicting demands of the tribe and off-reservation district was insufficient even though the Department of the Interior was contractually obligated to supply water to the irrigation district. The court reasoned that the Secretary's accommodation "fail[ed] to demonstrate an adequate recognition of his fiduciary duty to the Tribe" and that the trust responsibility obligated him to condition the diversion so that the water remaining for the reservation would be maximized. *Id.* at 256-257.

In *Nance*, the Crow Tribe and other petitioners challenged the Environmental Protection Agency's approval of the

Northern Cheyenne Tribe's redesignation of air quality on its reservation from Class II to the Class I standard. Petitioners claimed that the EPA's activity in approving the redesignation for off-reservation land violated the trust responsibility owed to the Crow Tribe of Indians whose reservation is situated adjacent to and west of the Northern Cheyenne's reservation. Petitioners were concerned that the more stringent Class I standards would interfere with development, such as coal mining, on the Crow Reservation. The Ninth Circuit recognized that, even though only Northern Cheyenne lands were redesignated, federal approval of that action impacted the Crow Reservation and, consequently, the EPA was required to proceed in a trustee capacity vis-a-vis the Crow Tribe. 645 F.2d at 711. The court concluded, however, that the EPA had fulfilled its fiduciary obligation, and the EPA's approval of the redesignation was affirmed. *Id.* at 711-12. Thus, both *Pyramid Lake* and *Nance* stand for the proposition that a federal agency's trust obligation to a tribe extends to actions it takes off a reservation which uniquely impact tribal members or property on a reservation.

In spite of the well-established relationship between the government and the Northern Cheyenne Tribe, the Department argues that there is no scientific trust obligation that requires the Secretary to consider impacts of the coal lease sale on the tribe. Citing *United States v. Mitchell*, 445 U.S. 535 [7 Indian L. Rep. 1014] (1980), the Department contends that a particular responsibility must be established by "special" statutory or treaty language. In *Mitchell*, a group of individual allottees of land within an Indian reservation sought money damages from the Secretary of the Interior for the alleged mismanagement of timber property on allotted lands. The allottees asserted that they were entitled to damages because this alleged misconduct was a breach of the fiduciary duty owed to them by the Secretary as trustee of the allotted lands. Citing the language and legislative history of the General Allotment Act, the Court concluded that the Act created only a limited trust relationship between the United States and the allottees and that the Secretary had no fiduciary responsibility to manage timber resources.

The Department also relies on *North Slope Borough v. Andrus*, 642 F.2d 589 [7 Indian L. Rep. 3026] (D.C. Cir. 1980). In *North Slope Borough*, plaintiffs, representatives of native Alaskans and environmental organizations, brought suit to enjoin the Secretary from selling oil and gas leases off the north coast of Alaska. Among other things, plaintiffs allege that the Secretary's action violated a trust responsibility to the Alaskan natives. Citing *Mitchell*, the District of Columbia Circuit concluded that none of the federal statutes before it, including the Endangered Species Act, NEPA, Outer Continental Shelf Land Act and others, specifically provided for a federal trust responsibility.

Neither *Mitchell* nor *North Slope Borough*, however, control the instant case. In *Mitchell* Congress had acted pursuant to its plenary power over Indian tribes and had defined the extent of the trust responsibility owed to tribes under the Allotment Act. The Department has not identified any comparable congressional action limiting the government's trust responsibility to the Northern Cheyenne Tribe. In *North Slope Borough*, the native Alaskans had no treaty relationship with the United States, no constitution approved by the Secretary, and there was no statutory or administrative recognition of a trust responsibility owed to them. Further, in sharp contrast to the present case, the court found that the Secretary had given "purposeful attention" to the special needs of the native Alaskans and had identified and extensively considered the impacts of the lease sale on the native community. *North Slope Borough*, 642 F.2d at 612. Finally, in both *North Slope Borough* and *Mitchell*, the courts "left open the questions of whether, on remand, other statutes

might support the assertion of a trust responsibility, or whether a 'special relationship' between the United States and the Indian tribe could support that claim." *North Slope Borough*, 642 F.2d at 611 n.148; see also *Mitchell*, 445 U.S. at 546 n.7.

The Secretary downplays his responsibilities to the tribe by arguing that the decision to hold the lease sale was taken in the "national interest." He correctly points out that his duties and responsibilities extend to all United States citizens, and he takes the position that federal coal development is vital to the nation's energy future. The Secretary's conflicting responsibilities and federal actions taken in the "national interest," however, do not relieve him of his trust obligations. See *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 323-24 (Ct. Cl. 1966). To the contrary, identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency's conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights. See Cohen at 227-28.

The court concludes that the special relationship historically existing between the United States and the Northern Cheyenne Tribe obligated the Secretary to consider carefully the potential impacts to the tribe resulting from the lease sale of federal coal tracts lying adjacent to or near the Northern Cheyenne Reservation. Ignoring the special needs of the tribe and treating the Northern Cheyenne like merely citizens of the affected area and reservation land like any other real estate in the decisional process leading to the sale of the Montana tracts violated this trust responsibility. Once a trust relationship is established, the Secretary is obligated, at the very least, to investigate and consider the impacts of his action upon a potentially affected Indian tribe. If the result of this analysis forecasts deleterious impacts, the Secretary must consider and implement measures to mitigate these impacts if possible. To conclude that the Secretary's obligations are any less than this would be to render the trust responsibility a *pro forma* concept absolutely lacking in substance.

#### D. The Department's Defenses

The Department raises a number of defenses in this action which apply to one or more of the grounds upon which the tribe bases its lawsuit. These defenses are addressed individually in the following sections.

##### 1. Participation in the Administrative Process

The Department argues that the Northern Cheyenne Indian Tribe is guilty of unclean hands because it failed to participate in the process leading to the Secretary's decision to hold the coal lease sale. The Department emphasizes the tribe's failure to comment on the draft EIS during the public comment period. Relying heavily on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 435 U.S. 519 (1978), the Department claims that those who challenge an agency's action must participate in the administrative process.

There is considerable dispute between the parties as to how much the tribe actually participated in the process. Both sides supplied the court with conflicting chronologies each purporting to document the extent of the tribe's participation and the degree to which the Department solicited tribal participation. The extent of participation, however, does not appear to be material to this case. Even if the Department's position that the tribe failed to participate in the process is assumed, the defense fails as a matter of law to relieve the Department of its obligations under NEPA, the FCLAA, and the trust responsibility. The court need not ferret through the administrative record to determine which party's chronology of tribal

participation rings true.

It was the Department's responsibility in this case to comply with NEPA in the first instance. NEPA " 'places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action' . . . [and] it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Electric v. National Resources Defense Council*, 462 U.S. 87, 97 (1983) (quoting *Vermont Yankee*, 435 U.S. at 553).

*Vermont Yankee* provides some guidelines to determine when participation by a party who later challenges the agency's action on NEPA grounds is decisive to the outcome of the case. In *Vermont Yankee* environmental groups challenged, among other things, the failure of the Federal Power Commission to consider a conservation alternative in an EIS formulated to aid in deciding whether or not to license a nuclear power plant. The Court carefully set forth its reasons for its finding that at the time the Commission's decision was made, energy conservation was given little serious thought and was not generally recognized as an alternative in energy-related decisions. Then, in addressing the necessity of participation, the court concluded that, even though agencies have the obligation to comply with NEPA,

it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions. This is especially true when the intervenors are requesting the agency to embark upon an exploration of uncharted territory, as was the question of energy conservation in the late 1960's and early 1970's.

435 U.S. at 553.

Likewise, in *Seacoast Anti-Pollution League v. Nuclear Regulatory Commission*, 598 F.2d 1221 (1st Cir. 1979), the court in rejecting petitioners' contentions that the agency should have considered certain alternative sites for the construction of the nuclear facility stated that:

The agency bears the primary responsibility to investigate serious alternatives, but reviewing courts, when weighing objections based on an alleged failure to study alternatives, properly may consider the extent and sincerity of the opponents' participation.

*Id.* at 1231. The court proceeded to find that the alternatives presented by petitioners were remote, speculative, and would not significantly affect the project under considerations. *Id.* at 1233.

Even though *Vermont Yankee* and *Seacoast* concerned an agency's duty to formulate and consider alternatives rather than, as in this case, the duty to consider impacts of alternatives already formulated, the two cases do provide standards to gauge the necessity of participation. Participation in the administrative process by a party challenging the EIS is decisive only when the alternative pressed upon the agency is remote, speculative, or obscure. That is not the case here. The geographic proximity of the lease tracts to the Northern Cheyenne Reservation alone implied the need to at least investigate impacts on the reservation. As set forth earlier, the Department knew from studies conducted in the preparation of the coal management program that development of federal coal near reservations may especially burden Indian tribes because of their unique cultural, social and economic circumstances. Finally, the Department studied the impacts of development on several off-reservation communities without requiring that those communities participate in the administrative process. Thus, the participation of the Northern Cheyenne Tribe was not necessary because the need to investigate impacts on the tribe and the reservation would

have been readily apparent if the Department had diligently investigated the impacts of its alternatives in accordance with NEPA's mandate.

There is even less of an argument supporting a participation requirement under the FCLAA. The FCLAA imposes upon the Secretary an affirmative duty to "consider effects which mining of the proposed lease might have on an impacted community or area. . . ." 30 U.S.C. § 201(a)(3)(C). This duty is mandatory and is not, at least by the statutory language, contingent upon public participation.

Finally, to impose a strict requirement that the tribe demonstrate its participation in the administrative process or have its claims foreclosed is inconsonant with the special relationship between the tribe and the United States. Much like the relationship between a guardian and ward, the trust responsibility is predicated on an assumption that for various reasons a tribe may be unable to assert or protect its rights and interests. Once established, the trust responsibility insures that, unless Congress deems otherwise, the United States will protect the interests of the tribe to some degree. To impose a requirement that the tribe participate or lose its claims when it is dealing with an agency of the Department of the Interior, the very Department to which it looks primarily for protection, is repugnant to the special relationship's purpose.

## 2. The "No Impact" Defense

The Department's "no impact" defense is summarized in a paragraph in one of its briefs:

The Northern Cheyenne complain that while services, housing, government budgets, population increases, land use and social organizations were analyzed for other areas—no similar analysis was done for the Reservation or its towns. The explanation is uncomplicated—analysis indicates that the Tribe and Reservation will suffer no such impacts.

Federal defendants' memorandum in support of motion for summary judgment at 64. The Department argues that analysis conducted prior to the time the EIS was prepared led it to determine that the reservation would not experience population increases as the result of coal development and therefore would suffer no significant effect on the quality of the human environment from the impacts associated with population increases. The tribe contends that defendants' no impact theory arises not from analysis, but is instead a post hoc rationalization by the Department's counsel made in an effort to justify a defective EIS and to explain the Department's failure to consider impacts on the tribe. The record supports the tribe's contention.

The record lacks evidence that the no impact theory was even contemplated by the preparers of the tract profiles and EIS or by the Secretary in his decision to lease coal. It appears that this theory arose from documents, specifically an EIS prepared by the state for the proposed Montco Mine, which were not considered by the Secretary. In determining whether or not the Secretary's actions are arbitrary, capricious, an abuse of discretion, or contrary to law, this court is limited to the administrative record. The Montco EIS is not properly part of the administrative record because it was neither indirectly nor directly considered by the Secretary at the time the decision to hold the lease sale was rendered. At best the no impact theory is an attempt to rationalize the failure of the agency in the EIS and other decisional documents to consider the impacts of coal development on the tribe. A court cannot affirm an agency action by accepting post hoc rationalizations by counsel that are not grounded in the administrative record. See *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962). This fun-

damental rule of administrative law also applies to NEPA cases. See *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972). Even if there were some hint in the administrative record of the no impact theory, the failure to incorporate that theory in the EIS is by itself inadequate. See *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980).

The no impact theory is not supported by the record and is inconsistent with other legal theories urged upon the court by the Department. The Department has asked the court to accept its statement that it made a conscious decision to treat the tribe like any other group of citizens and tribal land like any other real estate in the affected area. Yet, if that statement is true, then it appears, contrary to the no impact theory, that the EIS contemplates substantial population increases on the reservation under the various alternatives that are proportionate to the increases forecast for Big Horn and Rosebud counties. See, e.g., EIS at 80.

Moreover, there is no analytical support in the administrative record or the EIS for the conclusion that the reservation will be immune from population increases. Counsel for the Department point to a tribal program to purchase fee patent and allotted lands within the reservation boundaries and thereby reacquire land for the tribe as evidence that the reservation will not incur population increases. Even assuming that the tribe has the financial wherewithal to make such purchases in light of the increased housing demand projected for the area adjacent to the mines and the probability that real estate prices will inflate, nowhere in the record is there any evidence that the Department considered or even knew of the land acquisition program.

Even if the reservation were immune from population increases, it is arbitrary and unreasonable for the Department to assume, without the support of carefully documented analysis, that there would be no socioeconomic or cultural impacts on the Northern Cheyenne Tribe. It is unlikely that socioeconomic impacts are simply a function of increased population on the reservation or that the reservation can remain socially and economically isolated in the face of extensive coal development adjacent to the reservation. Regardless of the actual residence of incoming workers and service-related people, their demands for services will likely impact a more extended region to some degree. Analysis is warranted to define these potential impacts and to propose appropriate mitigation measures.

### 3. Continuing Control Over Coal Mining Development

The Department argues that any shortcomings in the Powder River region EIS can be adjusted for later in the coal development process because the Department maintains continuing control over the project as it must approve detailed mining plans before actual mining can take place. This argument is unpersuasive.

In *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978), the Second Circuit set forth useful criteria to determine when subject matter may be deferred to a later EIS in a multi-stage project.:

[T]he extent to which treatment of a subject in an EIS for a multistage project may be deferred, depends on two factors: (1) whether obtaining more detailed useful information on the [subject] is "meaningfully possible" at the time when the EIS for an earlier stage is prepared, and (2) how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project.

*Id.* at 1378 (citations omitted).

There is nothing in the administrative record to indicate

that gathering data concerning impacts, socioeconomic or otherwise, on the Northern Cheyenne Tribe was not "meaningfully possible" at the time the sale EIS was prepared or that the Department consciously deferred this analysis to EISs arising at a later stage of coal development. Further, the FCLAA mandates that the Secretary consider impacts on communities prior to the issuance of any lease. 30 U.S.C. § 201(a)(3)(C).

In recent cases courts have recognized the importance of assessing impacts as early in multi-stage development as possible. In this case readily available options for mitigation of the effects of coal development on the Northern Cheyenne Tribe—e.g., lease stipulations, distancing tracts from the reservation, and spreading the lease sales over a longer time period—would be foreclosed if not investigated in the earlier sale EIS. Thus, the decision to sell the tracts is a critical stage in coal development with respect to mitigation measures. Cf. *California v. Block*, 690 F.2d 753, 762-63 (9th Cir. 1982) ("[T]he promise of site-specific EIS's in the future is meaningless if later analysis cannot consider wilderness preservation as an alternative to development. The 'critical decision' to commit these areas for non-wilderness uses, . . . is 'irreversible and irretrievable.'"); see also *Conner v. Burford*, CV-82-42-BU, slip op. at 5-6 (D. Mont. 1985).

Contrary to its position before this court, the Department has also recognized the need for early analysis of socioeconomic impacts:

What the Department can do is influence, and in some cases determine, the location, timing, and nature of development. Instead of providing a response after the commitment to development is made, the Department's authority must focus on the decisions that surround the initial decision to proceed.

Final Environmental Statement, Federal Coal Management Program at 6-10. Thus, the Department's "continuing control over mining developments" cannot excuse its failure to consider impacts on the tribe in the lease sale EIS.

### 4. Lessees as Indispensable Parties

The Department claims that the failure of the tribe to join the lessees in this action bars the court from setting aside the leases issued by the Department. The Department asserts that the lessees are indispensable parties to this litigation and that their rights in the leases cannot be affected without having them before the court. In the factual circumstances of this case, this claim is without merit.

The tribe's complaint was filed and served one week prior to the Powder River sale. The tribe's counsel wrote to the BLM Wyoming State Director on April 23, 1982, and advised him that the tribe's suit had a *lis pendens* effect on the coal sale. An April 27 Department of the Interior news release issued from the Secretary's office reported the District of Columbia Court's holding "that prospective bidders would take their leases subject to the possible outcome of this litigation."

When the sale was held on April 28, 1982, a Department representative orally notified bidders prior to bidding that the tribe had filed suit and that this litigation was a *lis pendens* on the sale. Subsequent to the sale, in formal decisions to issue leases to the successful bidders, the Department conditioned the leases by recognizing that:

The issuance of coal leases resulting from the April 28, 1982, Powder River coal lease sale has been challenged in two lawsuits. . . . There is no current court order preventing issuance of the above leases. However, as the BLM Wyoming State Director announced at the beginning of the lease sale, the U.S. District Court for the District of Columbia stated on April 22, 1982, when

denying a motion for a temporary restraining order in the *Northern Cheyenne* case:

"Furthermore, as the Court mentioned a moment ago, the doctrine of *lis pendens* would be applicable to prospective bidders and they would take the lease, if they were successful, subject to the possible outcome of this litigation."

Thus, the successful bidders took the coal leases subject to the pending litigation. It is well recognized that

[W]hoever purchases or acquires an interest in property that is involved in pending litigation stands in the same position as his vendor, is charged with notice of the rights of his vendor's antagonist, and takes the property subject to whatever valid judgment may be rendered in the litigation. In other words, a person who deals with property while it is in litigation does so at his peril.

51 Am. Jur. 2d *Lis Pendens* § 1 (1970) (footnotes omitted). There was no requirement that the lessees be joined or that they be allowed by right to intervene in this litigation.

[I]t is generally considered that the pendente lite purchaser's alienor, assuming that the alienor is a party, represents the purchaser's interests in the property in litigation, and that the mere fact that a person is a pendente lite purchaser of property in litigation does not, in itself, qualify him as a necessary party to that litigation.

It has been observed that in the absence of an appropriate statute declaring otherwise, a pendente lite purchaser of property involved in litigation has, as such, no settled right to intervene in that litigation, and that such a purchaser's status, as such, is not enough, standing alone, to require the court to grant the purchaser's application to intervene.

*Id.* at section 43 (footnotes omitted). See *Mellen v. The Moline Malleable Ironworks*, 131 U.S. 352 (1889); *Conservation Law Foundation of New England v. Andrus*, 623 F.2d 712 (1st Cir. 1979). Here the successful bidders and eventual lessees had notice of this litigation. They chose not to seek intervention. There is no basis in either fact or law for the court to deny the tribe the relief sought because of its failure to join the lessees in this litigation.

Additionally, the tribe contends that its suit seeks to vindicate public rights under federal law and therefore falls within the public interest except[ion] to the general rule which necessitates joinder of the lessee when rights in a lease are being adjudicated. Because the court finds that the sale was subject to a *lis pendens*, it need not reach the tribe's contention.

#### E. Conclusion

The tribe has shown that the Secretary had a duty, one created by three independent sources (NEPA, the FCLAA, and the trust responsibility), to investigate and consider the impacts including socioeconomic impacts that proposed federal coal development in close proximity to the Northern Cheyenne Reservation would have on the Northern Cheyenne Tribe and its lands. The exclusion of these impacts in the EIS and the Secretary's failure to consider these impacts in his decision is a clear breach of these duties. With respect to the NEPA violation, this case is not one that concerns a question of whether or not a topic that was included in the EIS was sufficiently discussed. Instead, the problem here arises from the fact that a significant segment of information necessary to the EIS was excluded and therefore not considered by the Secretary in the course of making his decision to hold the lease sale.

Contrary to the government's contentions, this case does not merely reflect a difference of opinion regarding the policy

of federal coal development and the Department's decision to proceed rapidly with this development. The Department has claimed that the tribe has "flyspecked" the extensive administrative record formulated by Interior to conjure up a few issues in an attempt to vindicate their policy preference." This court is cognizant of the need to take caution that NEPA and other statutory schemes are not manipulated beyond Congress' intent in attempts by litigants to raise policy objections to proposed federal actions. See *Metropolitan Edison*, 460 U.S. at 777-78. Here, however, such a claim cannot be accepted because it would require the court to overlook clear violations of law that were committed in the coal development process on the pretext that these flaws are merely "policy differences" that must be sorted out in the political process and not in the courts.

The court notes in this context that the Northern Cheyenne Tribe has expressly stated that it does not object to federal coal development in the region; it objects only to development that is undertaken without due regard to potential impacts on the tribe and tribal land. The issues here are not whether coal leasing is desirable or whether leasing is necessary from a national energy standpoint. The issues are not matters of policy but are simply questions of whether or not the defendants complied with the applicable federal law during the leasing process. The court concludes that they have not.

An appropriate order shall issue in accordance with this memorandum opinion.

#### Order

Pursuant to the memorandum opinion filed this day in the above-captioned case,

It is ordered that:

1. Plaintiff's motion for summary judgment is granted;
2. Defendants' motion for summary judgment is denied;
3. Judgment shall be issued declaring that the Secretary of the Interior's decision to hold, and defendants' implementation of, the Montana portion of the Powder River coal sale of April 28, 1982, violated the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, the Mineral Lands Leasing Act as amended by the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 181 *et seq.*, their implementing regulations, and the federal trust responsibility to the Northern Cheyenne Tribe, in that the sale was formulated without adequate consideration of: (a) its cultural, social or economic effects on the Northern Cheyenne Tribe, the Northern Cheyenne Reservation, or any reservation community, or (b) means to mitigate such effects;
4. All federal coal leases issued as a result of the sale are void;
5. Defendants and their agents shall: (a) refrain from issuing federal coal leases arising from the Montana portion of the sale, and (b) take all action necessary to rescind any issued federal coal lease arising from the Montana portion of the sale.

The clerk is directed to enter judgment accordingly.

The clerk is further directed forthwith to notify counsel for the respective parties of the making of this order.

---

*Counsel for petitioner tribe:* Steven Chestnut, Zientz, Pirtle, Morisset, Ernstoff & Chestnut, Seattle, Washington.

---

*Counsel for defendant:* William Cohen, Washington, D.C.

**Exhibit H**

SIERRA CLUB  
LEGAL DEFENSE FUND

OCT - 7 1996

RECEIVED

FILED

NOV 07 - 2 A 11:33

CLEAR

BY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

THE KLAMATH TRIBES,

Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED  
STATES FOREST SERVICE, DAN  
GLICKMAN, Secretary of Agriculture,  
and ROBERT WILLIAMS, Acting  
Regional Forester, United States  
Forest Service, Region 6,

Defendants,

and

BOISE CASCADE CORPORATION,

Defendant-Intervenor,

and

HUFFMAN-WRIGHT and PAUL AND  
ROBERT WAMPLER, INC.

Defendant-Intervenors.

Civil No. 96-381-HA

OPINION AND ORDER

248

Patti A. Goldman  
Kristen L. Boyles  
Sierra Club Legal Defense Fund  
705 Second Avenue, Suite 203  
Seattle, Washington 98104-1711

Edmund J. Goodman  
Native American Program  
Oregon Legal Services  
917 S.W. Oak Street, Suite 410  
Portland, Oregon 97205-2807

Attorneys for Plaintiff

Geoffrey Garver  
Sandra B. Zellmer  
United States Department of Justice  
Environment and Natural Resources Division  
General Litigation Section  
P.O. Box 663  
Washington, D.C. 20044-0663

Kristine Olson  
United States Attorney  
District of Oregon  
James Sutherland  
Assistant United States Attorney  
701 High Street  
Eugene, Oregon 97401

Attorneys for Defendants

Scott W. Horngren  
Shay S. Scott  
Haglund & Kirtley  
1800 One Main Place  
101 S.W. Main Street  
Portland, Oregon 97204

Attorneys for Defendant-Intervenors

HAGGERTY, Judge:

On July 27, 1995, President Clinton signed into law the Emergency Supplemental Appropriations for Disaster Relief and Recessions Act ("Recessions Act"), Pub. L. No. 104-19, 109 Stat. 194 (1995). "Though principally an appropriations bill, the [Recessions] Act contained several provisions aimed at expediting the award of timber harvesting contracts[.]" Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 828 (9th Cir. 1996). Section 2001(k) of the Recessions Act is one such provision. It requires the release and harvesting, "notwithstanding any other provision of law," of "all timber sale contracts offered or awarded before [the Act's enactment] in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121." Section 2001(k)(1), Pub. L. No. 104-19, 109 Stat. 194, 240-47.

This case concerns the effect of Section 2001(k) on eight timber sales within the former Klamath Reservation. The sales are known as (1) Blue Ford; (2) Willy; (3) Yoss Ridge; (4) Bill; (5) Cinder; (6) Nelson; (7) John; and (8) John Lodgepole.

Plaintiffs move for a preliminary injunction "prohibiting logging of [the] eight timber sales within the former Klamath Reservation unless and until the United States ensures, in

consultation with and with the concurrence of the Klamath Tribes on a government-to-government basis, that the resources on which the Klamath Tribes' Treaty Rights depend will be protected" (docs. # 9-1, 127-2). Plaintiffs also move for summary judgment (doc. # 127-1). The federal defendants have filed a cross-motion for summary judgment (docs. # 160, 173). For the reasons provided below, plaintiffs' motions are granted in part and denied in part.

#### CONTENTIONS OF THE PARTIES

On March 13, 1996, the Klamath Tribes ("plaintiffs", "Klamath Tribes" or "Tribes"), filed this action challenging the decision of the United States Forest Service ("Forest Service") to proceed under Section 2001(k) with eight timber sales located in the Winema and Fremont National Forests in south-central Oregon. The Klamath Tribes contend that the Recessions Act was not intended to abrogate their treaty rights to hunt, fish, trap, and gather on their former reservation lands. They assert that by awarding and permitting logging of the timber sales within the former Klamath Reservation without engaging in meaningful consultation with the Tribes, the Forest Service has breached its trust responsibility to ensure that the former reservation lands are managed so as to protect the Tribes' treaty rights.

Plaintiffs argue that the harvesting of the eight timber sales will adversely impact the resources upon which their treaty rights depend. The Tribes are particularly concerned with the destruction and degradation of prime old-growth habitat for species, including the mule deer, on which the Tribes depend for their subsistence and way of life.

In their Complaint, the Tribes name as defendants: (1) the United States government; (2) the Forest Service; (3) Dan Glickman, the Secretary of Agriculture; and (4) Robert Williams, the acting regional forester for Forest Service Region 6, which contains the subject timber sales.<sup>1</sup> The court allowed the intervention by Boise Cascade Corporation and Huffman-Wright, timber companies that were awarded some of the timber sale contracts, and Paul and Robert Wampler, Inc., which contracted with Huffman-Wright to perform harvesting operations.<sup>2</sup>

Defendant-intervenors argue that the Recessions Act abrogated the Klamath Tribes' treaty rights. The federal defendants, however, contend that the Tribes' treaty rights

---

<sup>1</sup> These individuals and entities will be referred to collectively as "defendants."

<sup>2</sup> Boise Cascade, Huffman-Wright and Paul and Robert Wampler, Inc. will be referred to collectively as "defendant-intervenors."

survived enactment of the Recessions Act, but that the award of the timber sales does not infringe the Tribes' treaty rights. Defendants also argue that the Forest Service consistently and regularly consulted with the Klamath Tribes regarding the timber sales, thereby fulfilling its trust duties.

#### FACTUAL BACKGROUND

##### A. The Klamath Tribes' Treaty Rights

The Klamath Tribes entered into a treaty with the United States in 1864, whereby the Tribes relinquished aboriginal claim to over twenty million acres of land. Treaty between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, Art. I, 16 Stat. 707;<sup>3</sup> see United States v. Adair, 723 F.2d 1394 (9th Cir. 1983) (discussing historical background of the 1864 treaty). In return, certain lands were set aside and designated as the Klamath Reservation. The Tribes were given the exclusive right to hunt, fish, trap, and gather on the reservation. Throughout the remainder of the Nineteenth Century and into the Twentieth Century, the Tribes

---

<sup>3</sup> The Klamath and Modoc Tribes and Yahooskin Band of Snake Indians were all parties to the 1864 Treaty. The United States currently recognizes the Klamath Tribes, which consist of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, as a single federally recognized Indian Tribe. 25 U.S.C. §§ 564(a), 566.

relied on the reservation lands and resources to provide the subsistence, cultural, and spiritual needs of Tribal members. See Klamath & Modoc Tribes v. Maison, 139 F. Supp. 634 (D. Or. 1956).

The Klamath Termination Act of 1954, 25 U.S.C. §§ 564-564x, terminated the Klamath Tribes' federally recognized status.<sup>4</sup> Through this termination process, the United States acquired most of the former Klamath Reservation.

Although the Tribes lost ownership of the reservation land, the Termination Act expressly reserved the Treaty rights to hunt, fish, and gather on the former reservation. 25 U.S.C. § 564m(b). The Ninth Circuit has acknowledged that the Klamath Tribes retain their treaty rights to hunt, fish, and gather on the former Klamath Reservation. Kimball v. Callahan, 493 F.2d 564 (9th Cir.), cert. denied, 419 U.S. 1019 (1974) ("Kimball I"); Kimball v. Callahan, 590 F.2d 768 (9th Cir.), cert. denied, 444 U.S. 826 (1979) ("Kimball II").

While the Klamath Tribes once enjoyed an exclusive right to hunt, fish, trap, and gather on their former reservation, these treaty rights are now non-exclusive. Kimball I, 493 F.2d at 569-

---

<sup>4</sup> In 1986, the Klamath Restoration Act, 25 U.S.C. § 566, restored federal recognition to the Klamath Tribes.

70. Further, the Tribes' treaty rights on the former Klamath Reservation are subject to government regulation. Kimball II, 590 F.2d at 778. The scope of this regulatory authority was first set forth in a consent decree approving a Settlement Agreement among the Kimball II parties. Kimball v. Callahan, Civil No. 73-155, Final Consent Decree and Order (D. Or. May 13, 1981). The stated purpose of this Settlement Agreement is

to promote the sound and efficient management and conservation of fish and wildlife resources within the areas comprising the former Klamath Indian Reservation to ensure future use of these resources by both Klamath Indians and non-Indians. . . . More specifically, it is the purpose of this Agreement to establish a cooperative management and regulatory system. . . .

Settlement Agreement, at 2-3. With respect to habitat management on the former reservation, the Settlement Agreement states:

The protection and enhancement of fish and wildlife habitat is essential to the continued welfare of these resources. The parties therefore agree to cooperate as fully as practicable in the exchange of information regarding activities which could substantially alter habitat and thereby affect fish and wildlife resources on the reservation. This section applies to activities or proposed activities affecting habitat which takes place within or outside the reservation boundaries. . . . which could significantly affect fish and wildlife resources within those reservation boundaries; provided however, that the parties have no obligation to obtain each other's consent prior to adopting or implementing policies or positions on any such activities.

Settlement Agreement, at 9.

## B. Forest Service's Management of the Former Reservation

The former Klamath Reservation is now predominately part of the Winema and Fremont National Forests, which the Forest Service manages in accordance with multiple-use and sustained-yield principles. See National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600, *et seq.*; see also Idaho Conservation League v. Mumma, 956 F.2d 1508, 1511 (9th Cir. 1992); cf. Big Hole Ranchers Ass'n v. United States Forest Serv., 686 F. Supp. 256, 264 (D. Mont. 1988) (Forest Service "has wide discretion to weigh and decide the proper uses within any area" of the national forests). The Forest Service adopted forest plans for the Fremont and Winema Forests in 1989 and 1990, respectively. These plans establish the timber sale targets, the fish and wildlife objectives and standards, and the overall zoning and management strategy for the forests for a 10-15 year period. 16 U.S.C. § 1604. The forest plans explicitly acknowledge the Forest Service's obligation to manage the forests so as not to offend the Klamath Tribes' treaty rights to hunt and fish. The plans, however, neither identify the specific hunting and fishing needs of the Tribes, nor establish any specific criteria to ensure that the Tribes' treaty rights are not violated. Instead, the forest plans state that specific issues involving treaty rights will be

analyzed on a project-by-project basis through established administrative procedures.

Pursuant to the Forest Service's administrative appeals process, the Tribes appealed both the Fremont and Winema Forest Plans. The Tribes argued generally that the plans failed to fulfill the United States' obligations to the Tribes under the 1864 Treaty and pursuant to the United States' trust responsibility towards the Tribes. More specifically, the Tribes argued that the forest plans failed to provide adequate habitat to maintain and enhance mule deer herds within the former reservation, and failed to ensure that viable populations of other species of value to the Tribes would be maintained.

In its appeals decision, the Forest Service acknowledged its duty to manage the former reservation to protect treaty rights, and to engage in meaningful consultation with the Tribes to ensure that the Treaty rights will not be adversely impacted. The Forest Service recognized that compliance with all applicable environmental laws does not necessarily mean that treaty rights have not been violated, and that a determination that a project is consistent with the forest plan does not ensure that treaty obligations have been fulfilled. In the Winema Forest Plan Appeal Decision, the Reviewing Officer stated that consultations

with the Tribes "may result in a decision not to proceed with a project, even though the project is compatible with the Forest Plan." Reviewing Officer Decision on Klamath Tribes' Appeal of the Winema Forest Plan, at 11. In that decision, the Reviewing Officer also stated that "[d]uring site-specific analysis of proposed projects that affect treaty rights, the Forest [Service] must consult with the Tribe[s] to identify where modifications may be needed to protect such rights." Id. at 6.

The Forest Service ultimately approved both forest plans and deferred further consideration of treaty rights to the decision-making process for specific projects. See Reviewing Officer Decision on Klamath Tribes' Appeal of the Fremont Forest Plan.

### C. The Timber Sales at Issue

#### 1. The Willy Sale

The Willy sale on the Winema National Forest was awarded to defendant-intervenor Boise Cascade on November 14, 1995, pursuant to Section 2001(k)(1). The record reflects that logging of this sale has been completed.

#### 2. The John Lodgepole Sale

The John Lodgepole sale was rejected by the original high bidder, and subsequently awarded to Western Timber. The Ninth Circuit recently held that Section 2001(k)(1) does not preempt

the Forest Service regulations that grant "discretion in deciding whether to make awards to entities other than the high bidders." Northwest Forest Resource Council v. Glickman, No. 96-35132, 199, \_\_\_ F.3d \_\_\_, 1996 WL 325800 (9th Cir. 1996). Accordingly, the Recessions Act does not require the Forest Service to offer timber sales to other bidders if the high bidder rejects the sale. The Forest Service has represented that it will rescind its offer of the John Lodgepole sale.

### 3. The Nelson Sale

The Nelson sale on the Winema National Forest will not be awarded. According to defendants, the high bidder was not qualified to be awarded the sale and no other bidder expressed interest in the sale after being notified of its availability.

### 4. The Yoss Ridge Sale

The Klamath Tribes participated in the planning process for the Yoss Ridge sale. On December 6, 1990, the Tribes wrote to the Forest Service to express concerns regarding the effect of the preferred sale alternative on mule deer habitat. On June 28, 1991, the Forest Service finalized the Environmental Assessment ("EA") for the Yoss Ridge sale. The Acting Forest Supervisor concluded that the chosen alternative, as modified, would have no significant adverse effect on treaty resources, including mule

deer habitat. The Supervisor therefore issued a finding of no significant impact ("FONSI").

On August 30, 1991, the Klamath Tribes filed an administrative appeal of the EA/FONSI for the Yoss Ridge sale. The Tribes argued that the sale would violate their treaty rights, as well as relevant environmental legislation. This appeal was pending at the time the Recessions Act was enacted. On October 25, 1995, the Tribes' appeal was dismissed. The Forest Service awarded the Yoss Ridge sale to Boise Cascade on November 14, 1995. Approximately 4.8 million board feet of a total of 7.1 million board feet have been logged.

##### 5. The Cinder Sale

The record reveals that the Klamath Tribes expressed interest in participating in the planning of the Cinder sale. It is unclear, however, whether the Forest Service and the Tribes engaged in any meaningful dialogue regarding this sale before the issuance of the EA in July of 1992. The EA, which analyzed an aggregate of sales including the Cinder sale, found that "based on the Habitat Suitability Index under the Mule Deer Habitat Model, all of the 'action alternatives' would result in mule deer habitat as good or better than would result under the 'no action'

alternative." Defendants' Opposition to Motion for Preliminary Injunction, at 21.

The Tribes, with several additional environmental groups, filed an appeal of the EA/FONSI for the collective sales on September 30, 1992. The Tribes based their appeal on alleged violations of treaty rights and environmental laws. This appeal was pending at the time the Recessions Act was enacted. On October 30, 1995, the Tribes' appeal was dismissed. The Forest Service awarded the Cinder sale to Scott Timber Company on November 14, 1995. Approximately 1 million board feet of a total of 5.3 million board feet have been logged.

#### 6. The Blue Ford Sale

The Klamath Tribes participated in the planning process for the Blue Ford sale. During this process and before the issuance of an EA, the Tribes wrote to the Forest Service to express concerns regarding the sale's potential effect on mule deer habitat. The Forest Service finalized the EA for the Blue Ford sale in May of 1989. The Acting Forest Supervisor concluded in a FONSI that the chosen alternative would have no significant environmental impacts and would actually improve mule deer habitat.

On July 20, 1989, the Klamath Tribes filed an administrative appeal of the EA/FONSI for the Blue Ford sale. The Tribes argued that the sale would violate their treaty rights, as well as environmental statutes. The reviewing officer granted the Tribes' request for a stay of the award of a sale contract pending resolution of the appeal. In November 1989, the decision on the Blue Ford sale was reversed and the Forest Service was instructed to prepare a biological evaluation for the sale area.

The Tribes remained involved in the process of reassessing the sale. In August 1991, the Forest Service issued a new EA, which stated that the habitat suitability level for mule deer would increase as a result of the proposed sale because of a number of factors, including a decrease in open road density. The proposed sale involved a harvest of approximately 6.5 million board feet of timber.

The Tribes again appealed the Forest Service's decision to proceed with the Blue Ford sale. The reviewing officer again granted the Tribes' request for a stay of the award of a contract pending resolution of the appeal. On May 7, 1992, the Tribes' appeal was granted on grounds that the cumulative effects of the sale on the mule deer had not been adequately considered. The

Forest Service was directed to undertake further analysis of the cumulative effects.

On November 25, 1992, following additional review of the impact of the Blue Ford sale on the mule deer population, the Forest Service issued a new decision notice and FONSI, which modified the 1991 sale proposal. The 1992 sale proposal eliminated approximately 2 million board feet of timber and 1,200 acres from the harvest contemplated by the 1991 proposal. The FONSI stated that the chosen alternative would limit open road density and provide maximum cover, thereby increasing the mule deer habitat suitability index. The Tribes did not appeal this decision.

The Forest Service issued its intent to award the Blue Ford sale in October 1995, after the Recessions Act had been passed. The sale was awarded to Boise Cascade on November 30, 1995. The Blue Ford sale awarded to Boise Cascade is based on the 1991 sale figures, and involves harvest of 6.5 million board feet of timber from 2,447 acres. The record indicates that harvesting of the Blue Ford sale has not yet begun.

#### 7. The Bill Sale

On April 18, 1992, the Forest Service notified the Klamath Tribes of its intent to prepare an EA for the Bill sale. The

Tribes participated in the ensuing planning process. On August 12, 1992, a FONSI and decision notice to proceed with the sale were issued. "The Forest Supervisor found that timber harvest would not significantly change the habitat suitability index for mule deer." Defendants' Opposition, at 27. The Tribes appealed the decision to proceed with the Bill sale, alleging that it violated their treaty rights and offended certain environmental statutes. The decision to proceed with the Bill sale was affirmed. The reviewing officer specifically found that mule deer would not be adversely effected by the Bill sale, and that the Forest Service had properly consulted with the Tribes throughout the decision making process.

The purchaser of the Bill sale is defendant-intervenor Huffman-Wright. Approximately 1.7 million board feet of a total of 5.8 million board feet have been logged.

#### 8. The John Sale

The Tribes became involved in the planning process of the John sale in 1984. An EA for the John sale issued in August, 1987. On August 18, 1987, a FONSI and decision notice to proceed with the sale were issued. The Tribes appealed the decision to proceed with the John sale, raising concerns about treaty rights.

The decision to proceed with the sale was remanded for further analysis of its impact on mule deer.

The Forest Service undertook additional analysis and issued a new decision and FONSI in 1991. While the Tribes elected not to file an appeal of that decision, an environmental group did. That appeal was denied prior to the enactment of the Recessions Act.

#### LEGAL STANDARDS

To obtain preliminary injunctive relief in the Ninth Circuit, a party must meet one of two alternative tests. Under the "traditional" test, preliminary relief may be granted if the court finds:

- (1) the moving party will suffer irreparable injury if the preliminary relief is not granted;
- (2) the moving party enjoys a likelihood of success on the merits;
- (3) the balance of potential harm favors the moving party; and
- (4) the advancement of the public interest favors granting injunctive relief.

Burlington N. R.R. v. Department of Revenue, 934 F.2d 1064, 1074 n.6 (9th Cir. 1991).

Under the alternative standard, the moving party may meet its burden by showing either (1) probable success on the merits and the possibility of irreparable injury, or (2) that serious

questions are raised and the balance of hardships tips sharply in the moving party's favor. Id.; Associated Gen. Contractors of Cal., Inc. v. Coalition for Economic Equity, 950 F.2d 1401, 1410 (9th Cir. 1991), cert. denied, 503 U.S. 985 (1992). These formulations "represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." United States v. Odessa Union Warehouse Co-Op, 833 F.2d 172, 174 (9th Cir. 1987). The Ninth Circuit earlier said that this really describes one test: "a continuum in which the required showing of harm varies inversely with the required showing of meritoriousness." San Diego Comm. v. Governing Bd., 790 F.2d 1471, 1473 n.3 (9th Cir. 1986).

Courts apply a more exacting standard when the moving party seeks a mandatory, as opposed to a prohibitory, preliminary injunction. See Martin v. International Olympic Comm., 740 F.2d 670, 675 (9th Cir. 1984) (in issuing mandatory preliminary relief, courts should be "extremely cautious"). The Ninth Circuit has held that mandatory injunctive relief is "disfavored," and should be denied "unless the facts and law clearly favor the moving party." Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1979); see also Hertz Corp. v. Avis, Inc., 867 F. Supp. 208, 211-12 (S.D.N.Y. 1994) (moving party must

establish a substantial likelihood of success on the merits, rather than merely a likelihood of success).

#### DISCUSSION

Because Indian Tribes are regarded as "domestic dependent nations," they are owed a duty by the United States akin to the fiduciary duty owed a ward by his or her guardian. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831). While it is clear that the federal government has a "unique obligation toward the Indians," see Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 85 (1977), the courts have been reluctant to define the precise scope of the federal-Indian trust relationship. There is no doubt, however, that the government's trust responsibility extends to the protection of treaty rights. The Supreme Court has explained:

[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian Tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

In practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources. See Lac Courte Oreilles Band of Indians v. State of Washington, 668 F. Supp. 1233, 1240 (W.D. Wis. 1987); see also President's Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (April 29, 1994). As noted above, the Forest Service acknowledges this responsibility. See Winema Forest Plan Appeal Decision, at 7 ("A determination of what constitutes compliance with treaty obligations should not be made unilaterally; rather, the Tribe's view of the hunting, fishing, gathering, and trapping activities protected by the treaty must be solicited, discussed, and considered.")

Moreover, the federal government has a substantive duty to protect "to the fullest extent possible" the Tribes' treaty rights, and the resources on which those rights depend. See Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973). This proposition has been repeatedly confirmed by the courts. See, Northern Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987); Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist., 763 F.2d 1032 (9th Cir.), cert. denied, 474 U.S.

1032 (1985); No Oilport! v. Carter, 520 F. Supp. 334 (W.D. Wash. 1981); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Or. 1977). In a written policy regarding management responsibilities related to the Tribes' treaty rights, the Forest Service acknowledged its duty to manage "habitat to support populations necessary to sustain Tribal use and non-Indian harvest," including "consideration of habitat needs for any species hunted or trapped by tribal members".

1. Likelihood of Success on the Merits

A. Did the Recessions Act Abrogate the Tribes' Treaty Rights or Suspend the United States' Trust Responsibility?

Congress possesses the power to unilaterally abrogate Indian treaty rights via subsequent legislation. See e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). In determining whether Indian treaty rights have been abrogated, the critical inquiry is whether "Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." United States v. Dion, 476 U.S. 734, 739 (1986). Because of the fundamental nature of treaty rights, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." Id. (quoting Menominee v.

United States, 391 U.S. 404, 413 (1968)). Indeed, in the absence of explicit statutory language, courts have been "extremely reluctant to find congressional abrogation of treaty rights." Dion, 476 U.S. at 739; If no plain statement regarding abrogation is found on the face of the statute, congressional intent to abrogate treaty rights must be found from "clear and reliable evidence in the legislative history." Id.

Defendant-Intervenors argue that Congress, in enacting the Emergency Salvage Timber Sale Program of the Recessions Act, has evidenced an unmistakable intent to abrogate Indian treaty rights. Each of the eight timber sales now at issue was awarded under section 2001(k)(1) of the Recessions Act. That statutory provision provides:

**Notwithstanding any other provision of law, within 45 days after the date of enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121. The return of the bid bond of the high bidder shall not alter the responsibility of the Secretary to comply with this paragraph.**

(emphasis added).

Intervenors cite to the phrase "[n]otwithstanding any other provision of law" as the clear and plain statement of congressional intent to abrogate treaty rights. Intervenors argue that because the Klamath Tribes' treaty rights have the force and effect of law, those rights are subsumed within the term "law" found in the introductory phrase to section 2001(k)(1).

Federal defendants do not argue that the Recessions Act abrogates Treaty rights. Federal Defendants' Opposition to Preliminary Injunction at 32. Instead, the federal defendants contend that the sales do not infringe upon the Tribes' treaty rights, and that the Forest Service has fulfilled its trust duties.

Upon consideration of the parties' arguments, and the authorities provided, this court concludes that the federal defendants' premise is correct: the Recessions Act cannot be read to abrogate the Tribes' treaty rights. Under Dion, the court must find clear and reliable evidence in the legislative history indicating congressional intent to abrogate the treaty in question. Moreover, this court acknowledges that treaties in general, and the 1864 Treaty involving the Klamath Tribes in particular, are considered "the supreme Law of the Land." U.S.

Const. art. VI, cl. 2; see also Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Because treaties are the supreme law of the land, this court will not infer that Congress intended to abrogate treaty rights without a clear expression of such intent. That "clear expression" is lacking in this case. Plaintiffs are entitled to the injunctive relief and the summary judgment they have sought.

#### CONCLUSIONS

For the foregoing reasons and based on the cited authorities, the Tribes' motions for preliminary injunction and for summary judgment (docs. # 9-1, 127-1, 127-2) are granted in part and denied in part. The court grants the Tribes' motion for a preliminary injunction prohibiting the federal defendants from proceeding with "salvage" logging that will effect wildlife resources within the Tribes' former reservation, without ensuring, in consultation with the Klamath Tribes on a government-to-government basis, that the resources on which the Tribes' treaty rights depend will be protected.

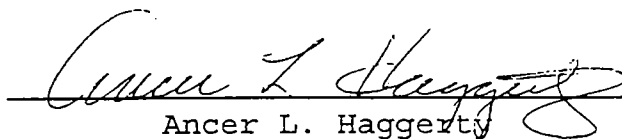
This injunction applies to the Yoss Ridge sale, the Cinder sale, the Blue Ford sale, and the Bill sale. The preliminary injunction also applies to the Willy sale, the John Lodgepole sale, and the Nelson sale, to the extent that the relief is not

moot. The grant of the summary judgment and the preliminary injunction does not apply to the John sale.

Defendants' motions for summary judgment (docs. # 160, 173) and for protective orders (docs. # 147, 194) are denied. Plaintiffs' motion to strike (doc. # 220) and defendants' motion to defer ruling (doc. # 224) are denied.

IT IS SO ORDERED.

Dated this 2 day of October, 1996.

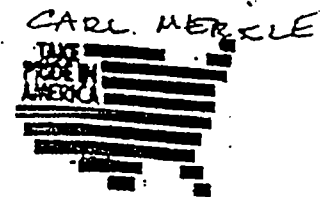
  
Ancer L. Haggerty  
United States District Judge

**Exhibit I**



✓ nat  
United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240



C6  
JUN 23 1994

JUL 14 1994

RECEIVED

Memorandum

To: Assistant Secretary for Fish and Wildlife and Parks  
Acting for From: Ada E. Deer *Faith Russell*  
Assistant Secretary - Indian Affairs

Subject: Indian Fish and Wildlife Policy

In recent months, personnel of this office and the Bureau of Indian Affairs have been requested to provide policy guidance for addressing the interests and concerns of tribal governments in carrying out a number of agency programs, activities and initiatives. In response to these requests, we have assisted in efforts to reauthorize the Endangered Species Act, develop a Recreational Fisheries Stewardship Initiative, and establish a Native American Policy for the U.S. Fish and Wildlife Service.

On March 18, a draft Indian Fish and Wildlife Policy developed by the Bureau and this office was forwarded for review and legal analysis. The Associate Solicitor, Division of Indian Affairs has recommended several changes to bring the policy in line with current Federal Indian law jurisprudence. We are pleased to provide the following revised policy principles and implementation guidelines for your consideration and use in future policy development and program related efforts.

Please let us know if we can be of further assistance.

POLICY PRINCIPLES

(1) Tribal Sovereignty and Jurisdiction.

- Tribes are recognized as governmental sovereigns in the Commerce Clause of the United States Constitution (Art. 1, Sec. 8), and have been referred to as quasi-sovereign domestic dependent nations (nations within a nation) by the courts.

- Tribes have the inherent power to make and enforce laws and to administer justice. Under principles of Federal Indian law, this power may extend to civil and criminal jurisdiction over individuals and corporations.

- Among the attributes of tribal sovereignty is the power to manage and control water and land resources, associated natural resources, and environmental protection. Tribal sovereignty also includes the power to regulate member and non-member hunting, fishing and gathering on-reservation, and related member uses in certain off-reservation settings. Federal recognition of these powers, whether arising from statute, executive order, or treaty, is the supreme law of the land.

- Despite their status as sovereigns, Indian tribes are subject to the plenary power of the Congress.

(2) The Government-to-Government Relationship / Consultation.

- There is a unique and distinctive political relationship existing between the United States and Indian tribes, as defined by treaties, statutes, court decisions and the United States Constitution, which differentiates tribes from other customers and constituencies, and which extends to all Federal agencies.

- The government-to-government relationship encompasses a renunciation of the old forced termination policy.

- The President of the United States, in an Executive Memorandum of April 29, 1994, charged all executive departments and agencies with the responsibility of ensuring that they operate in accordance with principles mandated by the nature of this government-to-government relationship.

- The government-to-government relationship requires working relationships and partnerships with tribal infrastructures and resource management authorities, including the sharing of technical staffs and information, to address issues of mutual interest and common concern, recognizing, however, that the release of tribal proprietary or consultative information may be restricted.

- Recognizing that tribes are not just another user-group or interest group requiring attention, the relationship requires going beyond simply discussing, exchanging views, or seeking tribal comment on internal policies and decisions which may affect the rights and status of tribal governments, the input from which may or may not be incorporated into decisionmaking. Direct and continuous tribal participation is required in planning, consensus seeking, and decision making processes involving line officers.

- The government-to-government relationship requires that Federal statutes and programs be administered in a manner that does not unilaterally interfere with tribal rights, and that agency missions be interpreted in a manner consistent with Federal Indian law and policy. Where an irreconcilable conflict arises, tribal rights will generally take precedence.

- Primary responsibility for carrying out trust and rights protection responsibilities on tribal lands and in treaty ceded territory rests with the Bureau of Indian Affairs, but all Federal agencies share responsibility when implementing laws that may affect Indian resources.

- The trust responsibility may involve the following activities: (1) protecting and managing tribal fish, wildlife and gathering resources, and associated tribal water and land resource assets and rights, to the highest degree of fiduciary standards; (2) absent a clear expression of Congressional intent to the contrary, administering Federal fish and wildlife conservation laws in a manner consistent with the United States' obligation to honor and protect the treaty, executive order, statutory, and other reserved rights of Indian tribes; and (3) interpreting Federal statutes and regulations affecting tribal fish and wildlife resources in accordance with the trust responsibility.

- Tribal fish and wildlife resources and associated water and land resource assets and rights are reserved solely for the use of tribes and their members, not for a public purpose or to benefit non-Indian communities.

- Trust responsibility fulfillment includes protecting and managing treaty-ceded and "usual and accustomed" areas, and associated Federal lands and habitats which support the resources upon which the meaningful exercise of tribal hunting and fishing rights depend, and administering Federal projects in a manner which prevents the diminishment of associated fish and wildlife resources, and the tribal share in them. It further implies protecting tribes' property rights, including the rights of future generations, to access "usual and accustomed" grounds and stations, regardless of land ownership status, for the purpose of exercising hunting, fishing, and gathering rights.

(5) The Unique Character and Special Status of Indian Lands.

- Indian lands are not public lands or part of the public domain, and are not subject to the public land laws. The purposes for which Indian reservations were created differ from the purposes for which other national land bases and reserves were created. Indian reservations were created to provide lands where tribes could become economically self-sufficient by making the land and resources productive for Indian people. The purpose of most Federal land bases and reserves is to protect their natural resources. These different purposes demand that different rules, practices, and policies be applied to govern activities on Indian lands versus other Federal lands.

- Under Federal law, Indian lands are "private trust assets" which were set aside for exclusive Indian use, not general public benefit, pursuant to treaties, statutes, and executive orders.

- While the naked legal title to Indian lands is held by the United States, tribes retain most of the benefits of ownership as do owners of fee simple property. Such property, however, cannot currently be alienated or encumbered without the Federal Government's approval.

- Indian lands are the principal resource available for the economic and social advancement of Indian people as beneficial owners, to be managed in accordance with tribal goals and objectives, within the framework of applicable law.

(6) The Unique Character of Indian Fish, Wildlife and Natural Resources.

- As a result of reservations in treaties and other legal instruments, some tribes have retained rights to hunt, fish, trap, and gather Indian fish and wildlife resources both on-reservation and in off-reservation settings, for subsistence, ceremonial, and commercial purposes. In some cases, the treaty-reserved power to access Indian fish and wildlife resources in off-reservation settings actually constitutes a property right or encumbrance on lands not owned by the tribe, a power no State or local government enjoys.

- Certain fish, wildlife and plant species, including some that are listed as threatened or endangered, possess cultural, religious, subsistence, and economic value to particular Indian tribes.

- The President of the United States, in an Executive Memorandum of April 29, 1994, directed all executive departments and agencies to work cooperatively with tribal governments and accommodate Native American religious practices to the fullest extent under the law.

(7) The Status of Tribes as Resource Co-Managers.

- Along with Federal and State Governments, Indian tribes are co-managers of many fish and wildlife resources, with shared responsibilities for such resources as a function of treaties, statutes, judicial decrees and other legal instruments.

- As co-managers, tribes have a need to develop and maintain partnerships and constructive working relationships with other resource management jurisdictions and authorities.

(8) Restrictions on Tribal Use of Fish and Wildlife Resources.

- A "reasonable and necessary" principle must be applied when agencies consider actions which would result in restrictions on the use or development of tribal fish and wildlife resources or on the exercise of tribal hunting, fishing, or gathering rights, or which would result in a conservation burden being imposed on a tribe. Consistent with court rulings pertaining to the exercise of treaty fishing rights, any such restrictions may be applied only when:

(a) They are reasonable and necessary for species preservation;

(b) They are the least restrictive available to achieve the required conservation purpose;

(c) They do not discriminate against Indian activities, either on their face or as applied;

➤ (d) When their purpose cannot be achieved solely through the regulation of non-Indian activity; and

(e) When voluntary tribal conservation measures are not adequate to achieve the conservation purpose.

- If it is necessary to impose restrictions, this shall not be interpreted as an abrogation of treaty rights. Clear Congressional intent is required before a later-enacted statute may be construed to abrogate Indian treaty, executive order, or other reserved powers or rights.

POLICY IMPLEMENTATION GUIDELINES

- In recognition of the need to protect tribal rights and to fulfill the trust responsibility owed to Indian tribes in carrying out Federal agency missions, programs, and actions, and of tribal roles and responsibilities as governments and resource managers, the Federal Government must involve tribes to the maximum extent possible in all decisionmaking processes which may affect the status of tribal fish and wildlife resources and the exercise of associated rights, and in all planning and implementation phases of agency operations, including those inter-agency, multi-species, and ecosystem-oriented programs undertaken by the Federal Government for the public good. This policy was formalized in Secretarial Order Number 3175, "Departmental Responsibilities for Indian Trust Resources," of November 8, 1993, and in the President's Executive Memorandum of April 29, 1994, which charged all executive departments and agencies with the responsibility of ensuring that they operate in accordance with principles mandated by the nature of the government-to-government relationship.

- Departmental bureaus and offices shall, to the maximum extent provided by law, decline to take or approve any action by other parties that could adversely affect the well-being of off-reservation trust resources or the meaningful exercise of associated off-reservation hunting, fishing, and gathering rights, unless all adverse consequences of such actions on trust resources and rights are fully mitigated in a timely manner. When this cannot be done, Departmental bureaus and offices shall mitigate such actions to the extent legally authorized and acceptable to the affected tribe(s) through agreements entered into by the relevant parties providing for mitigation that constitutes fair consideration for any associated adverse effects of the action on trust resources or rights.

- In implementing laws or court orders other than those protecting trust resources and rights, some of which may conflict with related protections, Departmental bureaus and offices shall select approaches having no adverse effects, or the least adverse effects, on trust resources and rights.

- In carrying out these directives, Departmental bureaus and offices are encouraged to consult with the Assistant Secretary - Indian Affairs, the Solicitor's Office, and the Bureau of Indian Affairs in order to clearly determine the Federal Government's fiduciary duty and the approaches that might be taken to meet this duty.